UNITED STATES OF AMERICA	)	
	)	**RULING: Defense Motion:**
v.	)	**Motion for Judicial Notice of**
	)	**Adjudicative Facts – Finkel Book**
Manning, Bradley E.	)	**And Public Statements**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**18 October 2012**
Fort Myer, Virginia 22211	)	

Finkel Book:

1. On 3 August 2012, the Defense moved the Court to take judicial notice of David Finkel's book The Good Soldiers, that it was published before publication of the video at issue in specification 2 of Charge II, and the book contains audio from the video. The Government did not oppose the Court taking judicial notice that the book was published before publication of the video but did object to the Court taking judicial notice that the book contains a verbatim transcript of the video. The Defense provided the Court with a Washington Post article dated 6 April 2010 by David Finkel describing an excerpt from his book but did not provide the excerpt from Mr. Finkel's book.

2. On 30 August 2012, the Court ruled in AE 288 that the Court would take judicial notice of Mr. Finkel's book and relevant excerpts from pages of the book if the Defense provided the Court with the necessary information. The Court denied the Defense motion to take judicial notice that Mr. Finkel's book contains a verbatim description of the audio from the video charged in Specification 2 of Charge II as linkages, argument, and legal conclusions regarding the contents of Mr. Finkel's book and the audio in the video are properly presented to the fact finder by the parties not by the Court.

3. The Defense has provided the Court with the video and relevant excerpts from Mr. Finkel's book. The Court compared the excerpts with the video. Defense now moves the Court to take judicial notice of Mr. Finkel's book, the date of publication, the provided excerpts, and that the book quotes the video verbatim at several key points.

4. The Court adheres to its 30 August 2012 ruling. The Court will take judicial notice of Mr. Finkel's book, the date of publication, and the provided excerpts. Comparisons between Mr. Finkel's book and conclusions to be drawn from the comparisons are properly presented to the fact finder by the parties not by the Court. The request to take judicial notice that the book quotes the video verbatim at several key points is denied.

Statements by Public Officials

1. On 3 August 2012, Defense moved the Court to take judicial notice of statements made by public officials and proffered the adjudicative facts judicially noticed would be relevant for sentencing. The Government opposed.

2. In their original motion, Defcnse proffered that the statement of publie officials that Defensc seeks to have judicially noticed as adjudicative faets are admissible as admissions by a party opponent under MRE 801(d)(2)(B) and (D). The Government opposed admission and judieial notice.

3. On 30 August 2012, the Defense supplied the Court with additional ease-law in support of their argument and additional bases for admission of the evidence to be judieially notieed. The Court ordered supplemental briefs to be filed by the parties regarding the following issues:

a. Admissibility under MRE 801(d)(2)(B) and (D) addressing the new ease-law provided by the defense; Whcther a statement by a Congressman is admissible.
b. Thc applieability of MRE 805 (Hearsay Within Hearsay);
c. Whether the requested evidenee is admissible as residual hearsay under MRE 807;
d. Whether each proposed statement offercd for admission is offered for the truth of the matter asscrted;
e. Admissibility of newspaper artieles as business reeords;
f. Whether thcre is any case-law regarding taking judicial notiee of newspaper articles;
g. The parties position regarding admissibility of the proposed publie statements for scntcneing when the rules have not been relaxed and when the rules have been relaxed IAW RCM 1001(c)(3).

Also on 30 August 2012, the Defense presented the Court with a 28 July 2010 letter from Senator Carl Levin to Seeretary of Defense Robert Gates, a 16 August 2010 response by Secretary Gates, and the portion of the Congressional Record of the 16 December 2010 hearing bcfore the Committee on the Judiciary, House of Representatives on Espionage Act and the Legal and Constitutional Issues Raised by Wikileaks that contained the opcning statement by congressman John Conyers, Jr..

4. On 13 September 2012, the Defense filed a supplemental brief. In it, the Defense provided a 24 April 2011 statement by Pentagon Press Seeretary Geoff Morrell and Special Envoy for Closure of the Guantanamo Detention Facility, Ambassador Daniel Fried, issued as a news release on the web by the Department of Defense (DoD). The Defense requested the Court takc judicial notice of this statement in lieu of the 24 April 2011 New York Times Article. Similarly, the Defense presented the Court with a 27 July 2010 statement of President Barraek Obama issued by the White House Office of Press Secretary. Defense moves thc Court to take judicial notiee of this statement in lieu of the 27 July 2010 BBC News article. Thc Defense further moves the Court take judieial notice of Senator Levin's 28 July 2010 letter and Mr. Gates' response in lieu of the 15 October 2010 Assoeiated Press and MSNBC articles and to take notice of the 30 Novcmbcr 2010 Defense.Gov news transcript of a DoD News Briefing with Secretary Gates in lieu of the 30 November 2010 New York Times Article. Finally, the Defense moves the Court to take judicial notice of Seeretary of State Hillary Clinton's 1 December 2010 "Remarks With Kazakh Foreign Minister Saudabayev After Their Meeting" released on the Department of State website in addition to Seeretary Clinton's eomments reported in the 1 Deeember 2010 USA Today article "Clinton: WikiLeaks won't hurt U.S. diplomaey", the 4 December 2010 CNN article "Clinton, WikiLeaks cables show diplomaey at work", 4 December 2010 New York

Times article "From WikiLemons, Clinton Tries to Make Lemonade", and 4 December 2010 UPI article "Clinton on leaked documents: So what?". The Government opposes but stipulates that the statemcnts at issue were madc and stipulatcs to the admissibility of that portion of the statements madc by Pentagon Press Secretary Morrcll and Special Envoy for Closure of the Guantanamo Dctention Facility Ambassador Daniel Fricd, President Obama, and Dcfense Secretary Gates in his 16 August 2010 letter. The Government furthcr concedes that if the rules sentencing are relaxed under RCM 1001(c)(3) that all of the statements except those of Secretary of State Hillary Rodham Clinton would be admissible.

A. **Geoff Morrell, Pentagon Press Secretary** – "It is unfortunate that thc New York Times and other news organizations have made the decision to publish numerous documents obtained illegally by Wikileaks concerning the Guantanamo detention facility. These documents contain classified information about current and former GTMO detainees, and we strongly condemn the leaking of this sensitive information. The Wikileaks rcleases include Detainee Assessment Bricfs (DABs) written by thc Department of Defense between 2002 and early 2009. These DABs were writtcn based on a range of information available then. The Guantanamo Review Task Forcc, establishcd in January 2009, considercd the DABs during its review of detainee information. In some cases, the Task Force came to the same conclusions as the DABs. In other instanccs, the Review Task Force came to different conclusions, based on updated or other available information. The assessments of the Guantanamo Rcview Task Force have not been compromiscd to Wikileaks. Thus, any given DAB illegally obtained and released by Wikileaks may or may not represent the current view of a given detainee. Both the previous and the current administrations have made every effort to act with the utmost care and diligence in transferring detainees from Guantanamo. The previous administration transferred 537 detainees; to datc, the current administration has transferrcd 67. Both administrations have made the protection of American citizens thc top priority and we are concernod that the disclosure of these documents could be damaging to these efforts. That said, we will continue to work with allies and partners around the world to mitigate threats to the U.S. and other countries and to work toward the ultimate closure of the Guantanamo detention facility, consistent with good security practices and our values as a nation."

B. **President Barack Obama** – "While I'm concerned about the disclosure of sensitive information from the battlefield that could potentially jeopardize individuals or operations, the fact is, these documents don't reveal any issues that haven't already informcd our public debate on Afghanistan. Indecd, they point to thc same challengcs that led me to conduct an extensive review of our policy last fall."

C. **Defense Secretary Robert Gates** – 16 August 2010 lettcr - "Thank you for your July 28, 2010 letter regarding the unauthorized disclosure and publication of classified military documents by WikiLeaks organization. I share your concerns about the potential compromise of classified information and its effect on the safety of our troops, allies, and Afghan partners. After consulting with the Director of the Federal Bureau of Investigation, I have directed a thorough investigation to determinc the scope of any unauthorized releasc of classified information and identify thc person or persons

responsible. I have also established an interagency Information Review Task Force, led by the Defense Intelligence Agency, to assess the content of any compromised information and thc impacts of such compromise. Our initial review indicates most of the information eontained in these doeuments relates to taetieal military operations. The initial assessment in no way discounts the risk to national security; however, the review to date has not revcaled any sensitive intelligenee sources and methods compromised by this disclosure. The doeuments do not contain the names of cooperative Afghan nationals and the Department takes very scriously the Taliban threats recently discussed in the press. We assess this risk as likely to cause signifieant harm or damage to the national security interests of the United States and are examining mitigation options. We are working closely with our allies to determine what risks our mission partners may face as a result of the diselosure. There is a possibility that additional military doeuments may be published by Wikileaks and the Department is developing courses of action to address this possibility. The scope of the assessment and the nature of the investigative process require a great deal of time and effort. I am committed to investigating this matter and determining appropriate action to reduce the risk of any such compromises in the future".

D. **Defense Secretary Robert Gates** - DoD News Transcript – 30 November 2010 – "Let me just offcr some perspective as somebody who's been at this a long time. Every other government in the world knows the United States government leaks like a sievc, and it has for a long time. And I dragged this up the other day when I was looking at some of these prospective rcleases. And this is a quotc from John Adams: How ean a government go on, publishing all of their negotiations with foreign nations, I know not. To me, it appears as dangerous and pernicious as it is novel. Now, I've heard the impact of thcse releases on our foreign poliey deseribed as a meltdown, as a game-changer, and so on. I think those deseriptions are fairly signifieantly overwrought. The faet is, governments deal with the United States because they believe we ean keep secrets. Many governments, some governments, deal with us because the fear us, some because they respect us, most beeause they need us. We are still cssentially, as has been said before, the indispensible nation. So other nations will eontinue to deal with us. They will eontinue to work with us. We will eontinue to share sensitive information with one another. Is this embarrassing? Ycs. Is it awkward? Yes. Consequences for U.S. forcign policy are I think fairly modest."

E. **Secretary of State Hillary Rodham Clinton,** DOS Press Release, 1 Deeember 2010, "Remarks With Kazakh Foreign Minister Saudabayev After Their Meeting" – "I have certainly raised the issue of leaks in order to assure our eolleagues that it will not in any way interfere with Ameriean diplomacy or our eommitment to continuing important work that is ongoing. I have not had any eoneerns expressed about whether any nation will not continue to work with and discuss matters of importanee to both of us going forward. As I said, I am proud of the work that American diplomats do, and the role that America plays in thc world. Both President Obama and I are eommitted to a robust and comprehensive agenda of engagement. And I am confident that thc work that our diplomats do every single day will go forward. I anticipate that there will be a lot of qucstions that people have every right and rcason to ask, and we stand rcady to discuss them at any time with our counterparts around the world."

F. **Secretary of State Hillary Rodham Clinton**, CNN Politics, 4 December 2010, – "Clinton: WikiLeaks cables show diplomacy at work", 4 December 2010 New York Times article "From WikiLemons, Clinton Tries to Make Lemonade", and 4 December 2010 UPI article "Clinton on leaked documents: So what?"– The confidential U.S. embassy cables posted online by the website WikiLeaks simply show "diplomats doing the work of diplomacy. Everybody is concerned. Everybody has a right to have us talk to them, and have any questions that they have answered, but at the end of the day – as a couple of analysts and writers are now writing –what you see are diplomats doing the work of diplomacy. But I haven't seen everybody in the world, and apparently there's 252,000 of these things out there in cyberspace somewhere so I think I'll have some outreach to continue doing over the next weeks just to make sure as things become public, if they raise concerns, I will be prepared to reach out and talk to my counterparts or heads of state government. In a way, it should be reassuring, despite the occasional tidbit that is pulled out and unfortunately blown up. The work of diplomacy is on display, and you know, it was not our intention for it to be released this way – usually it takes years before such matters are. But I think there's a lot to be said about what it shows about the foreign policy of the United States."

G.**Vice President Joseph Biden**, MSNBC, undated, transcript of interview with Andrea Mitchell – "I came in, almost all of it was embraces, I mean it wasn't just shaking hands. I know—I know these guys, I know these women. They still trust the United States. There's all kind of things and [In response to a question "So there's no damage?"] "I don't think there's any damage. I don't think there's any substantive damage, no. Look, some of the cables that are coming out here and around the world are embarrassing. I mean, you know, to say that, you now, for you to do a cable as an ambassador and say I don't like Biden's tic, he doesn't look good and he's a homely guy, that's not something."[I never said that] "No, I know you didn't. But yet, I mean, you know – so there's a lot of things like that would allow another nation to say they lied to me, we don't trust them, they really are not dealing fairly with us."

H. **The Honorable John Conyers, Jr. Hearing** on Espionage act and the Legal and Constitutional Issues Raised by WikiLeaks, 16 December 2010 – "We are too quick to accept government claims of risk to national security and far too quick to forget the enormous value of some national security leaks and, quoting Secretary Gates, "I have heard the impact of these releases on our foreign policy described as a meltdown, as a game changer, and so on. I think those descriptions are fairly significantly overwrought."

3. On 29 August 2012, during oral argument, the Defense withdrew its request for judicial notice of public comments from Marine Colonel David Lapan.

4. On 30 August 2012, during oral argument, the Defense provided the Court with a copy of the 16 August 2010 letter from Secretary of Defense Robert M. Gates to Senator Carl Levin, Chairman, Senate Committee on the Armed Services. The letter provided the source for Mr. Gates' statements quoted in the 15 October 2010 Associated Press article. In place of that

Article, the Defense requests the Court to take judicial notice of Mr. Gates' 16 August 2010 letter and the 28 July 2010 letter from Senator Levin requesting Mr. Gates' response.

The Law: Judicial Notice

1. Military Rule of Evidence (MRE) 201 governs judicial notice of adjudicative facts. The judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *U.S. v. Needham,* 23 M.J. 383 (C.M.A. 1987); *U.S. v. Brown,* 33 M.J. 706 (A.C.M.R. 1991).

2. MRE 201(c) requires the military judge to take judicial notice of adjudicative facts if requested by a party and supplied with the necessary information.

3. When the military judge takes judicial notice of adjudicative facts, the fact finder is instructed that they may, but are not required to, accept as conclusive any matter judicially noticed.

4. Judicial notice is of adjudicative facts. Judicial notice is not appropriate for inferences a party hopes the fact finder will draw from the fact(s) judicially noticed. Legal arguments and conclusions are not adjudicative facts subject to judicial notice. *U.S. v. Anderson,* 22 M.J. 885 (A.F.C.M.R. 1985) (appropriate to take judicial notice of the existence of a treatment program at a confinement facility but not appropriate to take judicial notice of the quality of the program.).

The Law: Hearsay

1. Hearsay is a statement, other than the one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the Military Rules of Evidence or by any Act of Congress applicable in trials by court-martial. MRE 802.

2. Admission by a Party Opponent. MRE 801(d)(2) provides in relevant part that admissions by a Party Opponent are not hearsay if the statement is offered against a party and is (A) the parties' own statement in either the party's individual or representative capacity; (B) a statement of which the party has manifested the party's adoption or belief in the truth; (C) a statement by a person authorized by the party to make a statement concerning the subject; or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant made during the existence of the relationship....The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under (C), or the agency or employment relationship and the scope thereof under (D).

3. Relevant Hearsay Exceptions:

   A. MRE 803(6) Records of Regularly Conducted Activity.

   B. MRE 803(8) Public Records and Reports

C. MRE 807 Residual Hcarsay

4. MRE 805 provides that hearsay includcd within hearsay is not excluded under the hearsay rule if each part of thc combined statement conforms with an exccption to the hcarsay rule provided in these rulcs.

The Law: Sentencing – Relaxed Rules.

1. RCM 1001(C)(3) authorizes the military judge, with respcct to matters in cxtenuation or mitigation or both, to rclax the rules of evidence. This may include admitting letters, affidavits, certificates of military and civil officers and other writings of similar authenticity and rcliability.

2. RCM 1001(C)(4) provides that whcn the rules of evidencc have been relaxcd for the Defensc, they may bc rclaxed during rebuttal and surrcbuttal to the same dcgree.

Conclusions of Law: The statements proffered by the Defense in enclosures A-H of the 13 September 2012 Dcfcnsc Supplement are not relevant to the merits portion of the trial. The conclusions of law below address admissibility during the sentcncing portion of the trial.

Admissibility as Admissions by a Party Opponent Under MRE 801(d)(2)(B) or MRE 801(d)(2)(D)

1. There is no direct military case law regarding whether statements by government agents ean be admissiblc against a party opponent in a criminal proceeding. Thc Federal Circuits have varied opinions on this issue, *see U.S. v. Bellamy,* 403 Md. 308, 322-325 (Ct. App. Md 2008). This Court agrees it is possiblc for statements by executivc branch officials to be admitted in a criminal proceeding as admissions of a party opponent. *See United States v. Van Griffin*, 874 F.2d 634, 638 (9th Cir. 1989) (holding that a manual on ficld sobriety testing issucd by the government should be admissible as an admission of a party opponcnt in a drunk driving case); *United States v. Barile*, 286 F.3d 749, 758 (4th Cir. 2002) (holding that in prosecution for making false statcments to the FDA, the statcmcnts of an employee of thc FDA could be admitted against the government pending propcr founding); *United States v. Warren*, 42 F.3d 647, 655 (D.C. Cir. 1994) (holding that government had manifested its belief in sworn statements by a police officer contained in an affidavit, therefore the statements were admissible under Federal Rule of Evidence (FRE) 801(d)(2)(B)). The Court further agrees with the Government that thc cases allowing such admissions are those wherc thc prosecution has manifcstcd its belief in the truth of a statement in a court proceeding or judicial documcnt that should be admissible when the Govcrnment takes a contrary position. *United States v. Branham*, 97 F.3d 835, 851 (6th Cir. 1991); *United States v. Morgan*, 581 F.3d 933, 937 (D.C. Cir. 1978).

2. The Court adopts the three-part test adopted by the Second Circuit in *United States v. Salerno*, 937 F.2d 797, 811 (2nd Cir. 1991) to dctermine if the statements at issue are admissible against the Govcrnment and worthy of judicial notice. The three-part tcst requires the Court, "[to] bc satisfied that the prior [statcmcnt] involves an assertion of fact inconsistent with similar assertions in a subsequent trial. Second, the court must determine that the [statcments] were

such as to be the equivalent of testimonial statements.... Last, the district court must determine by a preponderance of the evidence that the inference that the proponent of the statements wishes to draw is a fair one and that an innocent explanation for the inconsistency does not exist." *Salerno*, 937 F.2d at 811 (2d Cir. 1991) (quoting *United States v. McKeon*, 738 F.2d 26, 33 (2d Cir. 1984) (quotations omitted); *see also United States v. DeLoach*, 34 F.3d 1001, 1005 (11th Cir. 1994) (adopting the test from *Salerno*).

3. To qualify for admission as a statement against a party opponent, the statement must bear such a close resemblance to in-court testimony that they may be considered its functional equivalent. As the Court noted in *McKeon* while analyzing whether use of prior opening statements were admissible against the government in subsequent criminal trials, "Speculations of counsel, advocacy as to the credibility of witnesses, arguments as to weaknesses in the prosecution's case or invitations to a jury to draw certain inferences should not be admitted. The inconsistency, moreover, should be clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial. The court must further determine that the statements of counsel were such as to be the equivalent of testimonial statements by the defendant . . . Some participatory role of the client must be evident, either directly or inferentially as when the argument is a direct assertion of fact which in all probability had to have been confirmed by the defendant." *McKeon*, at 33.

4. Casual statements made to private individuals, with no expectation of conveyance beyond the listener are not testimonial, even if highly incriminating to another. *United States v. Scheurer*, 62 M.J. 100, 105 (CAAF 2005)(quoting Robert P. Mosteller, *Crawford v. Washington: Encouraging and Ensuring the Confrontation of Witnesses*, 39 U. Rich. L.Rev. 511, 540 (2005). Testimonial statements bear the indicia of reliability often "contained in formalized ... materials, such as affidavits, depositions, prior testimony, or confessions." *United States v. Hendricks*, 395 F.3d 173, 181 (3d Cir. 2005) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)). Statements "cannot be deemed testimonial" if the declarant "did not make the statements thinking that they would be available for use at a later trial." *U.S. v. Sheurer*, at 105 (quoting *Crawford*, 541 U.S. at 52).

5. To determine whether a statement is testimonial and non-testimonial statements, it is relevant to inquire: Was the statement at issue in response to a law enforcement or prosecutorial or formal inquiry? Is the statement a direct assertion of fact? What was the primary purpose for making the statement? *See United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007), *McKeon,* at 33.

6. The fact that a statement is admissible against a party opponent does not bind the party to that statement. The party against whom such a statement is made can rebut the statement and assert a different or contrary position. *Bellamy,* 403 Md. at 328, fn 19.

7. There are eight statements of public officials currently at issue.

A. The statement by Geoff Morell, Pentagon Press Secretary, is admissible under MRE 801(d)(2)(D). The substance of the statement, specifically that the assessments of the Guantanamo Review Task Force have not been compromised to Wikileaks, is an assertion of fact, and likely one inconsistent with the position taken by the government at

trial. This statement delivered by a Pentagon Press Secretary and distributed to the media for widespread publication was done so under formal circumstances and is bereft of personal opinion. The primary purpose of the statement was to convey information to the public, unlike a statement made to family or friends, and this direct assertion of fact in all probability had to be confirmed by the government. The statement therefore is imbued with the reliability that is the hallmark of a "testimonial statement." Finally, a preponderance of the evidence demonstrates the inference to be drawn by the Defense is a fair one.

B. The statement by President Barack Obama to ABC News on 27 July 2010 is admissible under MRE 801(d)(2)(D). The substance of the statement, specifically that the [released information] doesn't "reveal any issues that haven't already informed our public debate on Afghanistan" is an assertion of fact, and likely one inconsistent with the position taken by the Government at trial. This statement by the President was delivered under formal circumstances, and presented to the media in the Rose Garden to be distributed to the public. The primary purpose of the statement was to convey information to the public, and this direct assertion of fact in all probability had to be confirmed by the government. The statement therefore is imbued with the reliability that is the hallmark of a "testimonial statement." Finally, a preponderance of the evidence demonstrates the inference to be drawn by the defense is a fair one.

C. The 16 August 2010 letter from Secretary of Defense Robert M. Gates to Senator Carl Levin, Chairman, Senate Committee on Armed Services, is admissible under MRE 801(d)(2)(D). The substance of the statement, specifically that that the released information does not reveal sources and methods, is an assertion of fact, and likely one inconsistent with the position taken by the government at trial. The statement by Secretary Gates was delivered under formal circumstances, in response to a letter from Senator Carl Levin, and published on official letterhead. The primary purpose of the letter was to convey information to the Chairman of the Senate Committee on Armed Services and the public, and the direct assertions of fact contained therein in all probability had to be confirmed by the government. The statement therefore is imbued with the reliability that is the hallmark of a "testimonial statement." Finally, a preponderance of the evidence demonstrates the inference to be drawn by the defense is a fair one.

D. The statement by Secretary of Defense Robert M. Gates, on 30 November 2010, during a joint DOD news briefing with the Chairman, Joint Chiefs of Staff, Admiral Mike Mullen, is not admissible under MRE 801(d)(2)(D) and the Court declines to judicially notice the statement. The statement is not assertion of fact, it is one of personal belief ("I think those descriptions are fairly significantly overwrought.") Despite the formal circumstances under which the statement was made (c.g. a DOD news briefing with the Chairman of the Joint Chiefs of Staff) the Court finds the primary purpose of the statement was not an assertion of an unambiguous, factual matter, but a political one. Secretary Gates was addressing the press corps and explaining the repeal of the "don't ask, don't tell" law when a question arose regarding information sharing among the intelligence community. Secretary Gates was attempting to minimize the release of the

information on U.S. foreign policy. Persuasive speech of this kind is not a direct assertion of fact that in all probability had to be confirmed by the government, or is easily rebutted by similar assertions.

E. The statement by Sccretary of State Hillary Rodham Clinton published on the DOS website on 1 December 2010, is not admissible under MRE 801(d)(2)(D) and the Court declines to judicially noticc the statement. To begin, the statement is not an assertion of fact, it is onc of personal belief ("I think there's a lot to be said about what it shows about the foreign policy of the United States."). Despite thc formal circumstances under which the statement was made (e.g. declaration by a Secretary at a world security summit) the Court finds the primary purpose of the statement was not an assertion of an unambiguous, factual matter, but a political one. Secretary Clinton was attempting to bolster support among world leaders and top diplomats, despite the alleged sccurity violations. Persuasive speech of this kind is not a direct assertion of fact that in all probability had to be confirmcd by the government, or is easily rebutted by similar assertions.

F. The statements made by Secretary of State Hillary Rodham Clinton published by USA Today on 1 December 2010 and CNN.com, New York Times.com, and UPI.com on 4 December 2010, are not admissible under MRE 801(d)(2)(D) and the Court declincs to judicially notice thc statements. To begin, the statements are not an assertion of fact, it is one of personal belief ("I think I'll have some outrcach to continue doing over the next weeks…") The Court finds that the statements in this interview are not the functional equivalent of "testimonial statements." The statements were ostensibly made off-camcra, but on the record. Nevertheless, the Court finds the primary purpose was not an assertion of unambiguous, factual ınatters, but a political one. Secretary Clinton was again attempting to re-establish trust with world leaders through diplomacy. Persuasive speech of this kind is not a dircct assertion of fact that in all probability had to be confirmed by the government, or is easily rebuttcd by similar assertions.

G. Thc undated statement madc by Vice President Biden, during a one-on-one interview with NBC correspondent Andrea Mitchcll, is not admissible under MRE 801(d)(2)(D) and the Court declines to judicially notice the statement. To bcgin, the statement is not an assertion of fact, it is one of personal belief ("I don't think there's any damage.") The Court finds that the statements in this interview are not the functional equivalent of "testimonial statements." The statemcnts of the Vice President are not formally prepared remarks, rather they are off-the-cuff rcsponses to questions and include such phrases as "Sure, I did," "Sure they are," "Well, look…." "I love the Senate. I love the Congress. I keep in touch with them." The nature of the statements themselves, including the qualifying language ("I don't think there's any damage") do not support the principle that the statements are testimonial in nature. Moreover, the topics discussed during the interview cover a broad range of subjects from the Vice President's relationship with the President, to the death of Richard Holbrooke. In fact, the interview concluded with a holiday message from the Vice President to the scrvice members serving in Iraq. These statements were not a direct assertion of fact that in all probability had to be confirmed by the government, or arc easily rebutted by similar assertions.

H. The statement made by the Honorable John Conyers on 16 December 2010, during a Congressional hearing on the Espionage Act and the Legal and Constitutional Issues raised by Wikileaks, is not admissible under MRE 801(d)(2)(D) and the Court declines to judicially notice the statement. The statement is not an assertion of fact, it is one of personal belief ("We are too quick to accept government claims of risk to national security.") Despite the formal circumstances under which the statements were made (e.g. an on-the-record committee hearing) the Court finds the primary purpose of the statement is not an assertion of unambiguous, factual matters, but a politieal one. Congressman Conyers was attempting to get the public and the press to "slow down and take a closer look" at the alleged security violations. These statements were not a direct assertion of fact that in all probability had to be confirmed by the government, or is easily rebutted by similar assertions. The statement sought to be introduced by the Defense is primarily hearsay within hearsay, as Congressman Conyers is quoting Secretary Gates. Congressman Conyers' remarks regarding his perspective on government leaks is irrelevant to any issue of material fact in the case. Finally, this Court finds an additional impediment to admissibility of this statement, as the declarant is a member of the legislative, not executive, branch of government, and the legislature is not a party-opponent in the proceeding. *United States v. North,* 910 F.2d 843, 906-911 (D.C. Cir. 1990).

9. **Admissibility of Statements a Public Records Under MRE 803(8).**

A. As an additional basis for admission, the Court finds the 16 August 2010 letter from Secretary Gates admissible under MRE 803(8)(A). It is a record of activities setting forth the activities of the Department of Defense.

B. The remaining statements are not admissible under MRE 803(8)(A). Newspaper articles are not public records. Press releases by Government officials under the circumstances of this case do not set forth the activities of the agency. If such press releases were admissible under MRE 803(8)(A), such pronouncements by Government officials offered by the Government against the accused would be similarly admissible. Finally, a Congressional record could be admissible under MRE 803(8)(A) if relevant. The opening statement and the personal opinion of Congressman Conyers regarding his perspective on government leaks is irrelevant to any issue of material fact during sentencing proceedings.

10. **Admissibility of Comments Made by Government Officials for a non-hearsay purpose.** The Court finds the statements made by Mr. Morrell, President Obama, and Secretary Gates in enclosures A-C of the 13 September 2012 Defense Supplement are also admissible as non-hearsay in that the fact that the public statements of these Government officials were made is circumstantial evidence of minimized damage caused by the alleged Wikileaks disclosures. Similarly, the statements by Secretary Gates and Secretary Clinton made in DoD and DoS press releases (enclosures D and E) are similarly admissible for the non-hearsay purpose. The statements by Secretary Clinton and Vice President Biden (enclosures F and G) are similarly admissible for the non-hearsay purpose only if the newspaper article within which the statements appear qualify for a hearsay exception. The statement by Congressman Conyers, Jr. in the Congressional record (enclosure H) is not admissible for a non-hearsay purpose because his

personal opinion on government leaks is irrelevant to any issue of material fact during sentencing proceedings.

11. **Admissibility of Comments Made by Government Officials in Newspaper Articles under MRE 804, 803(6), and 807.**

A. The statements made by government officials in newspaper articles or articles published on the internet are hearsay within hearsay. Newspaper articles do not qualify as business records under MRE 803(6). *U.S. v. Robinson,* 43 MJ 501 (A.F. Ct. Crim. App. 1992); *U.S.v. Michtavi,* 155 Fed. Appx. 433 (11th Cir. 2005); *Nooner v. Norris,* 594 F.3d. 592 (8th Cir. 2010). Thus, statements made in newspaper articles where the reporter is not produced as a witness are hearsay within hearsay even if there is a hearsay exception or the statement is admitted for a non-hearsay purpose.

B. The newspaper articles at issue are also not admissible as residual hearsay under MRE 807. Residual hearsay should be used sparingly and requires that the statement be more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts. *See U.S. v. Kindle,* 45 MJ 284 (CAAF 1996) citing *Larez v. City of Los Angeles,* 946 F.2d 630, 644 (9th Cir. 1991) (testimony of newspaper reporters more probative than copies of newspaper articles). Additionally, there is no way to know whether the government officials quoted were quoted in part or in toto. Finally, the online interview of Vice President Biden at enclosure G is undated. None of the newspaper articles at issue bears the circumstantial guarantees of trustworthiness required for admissibility under MRE 807.

Conclusions of Law: Sentencing

Should the Defense move the Court to relax the rules of hearsay and authentication pursuant to RCM 1001(C)(3), the Court will permit the Defense to admit the statements in enclosures D-G in extenuation or mitigation or both at sentencing. The Court will take judicial notice of the existence of the statements in D-F. The Court will not take judicial notice of the existence of the interview at enclosure G unless the Defense provides evidence of the date of the interview was made to the Court. Relaxation of the rules under RCM 1001(e)(3) does not relax the rules of relevance. The statement by Congressman Conyers, Jr. in enclosure H is not relevant for sentencing and is not admissible under relaxed rules.

Ruling: The Defense motion for Judicial Notice of Public Statements is **Granted in Part**.

1. The statements by Mr. Morrell, President Obama, and Secretary Gates in enclosures A-C are admissible as substantive evidence and the Court will take Judicial Notice of the press releases in enclosures A and B and of the letters in enclosure C.

2. The statements in enclosures A – C and the statements by Secretary Gates and Secretary Clinton at enclosures D and E are admissible for a non-hearsay purpose as public statements made by government officials that provide circumstantial evidence of minimized damage caused by the alleged Wikileaks disclosures. The Court will take judicial notice of the existence of the press releases including the statements.

3. The statements made by Secretary Clinton and Vice President Biden in enelosures F and G are hearsay within hearsay and are not admissible for the non-hearsay purpose in paragraph 2 unless the Defense requests the rules be relaxed for these statements under RCM 1001(c)(3). If the rules are relaxed the Court will take judicial notice of the newspaper articles in enclosure F. If the Defense provides evidence of the date of the interview of Vice President Biden at enclosure G, thc Court will take judicial notice of the intcrview.

4. The statement by Congressman Conyers, Jr. is not relevant and is not admissible.

So **Ordered** this 18th day of Oetober 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judieial Circuit